APPEAL NO. 021278
FILED JULY 3, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq*. (1989 Act). A contested case hearing (CCH) was held on May 2, 2002. The hearing officer resolved the disputed issues by determining that the appellant (claimant) did not sustain a compensable occupational disease injury; that the claimant did not have disability; that the date of the alleged injury is _____; and that the claimant timely notified the employer of the alleged injury. On appeal, the claimant contends that the compensability and disability determinations are against the great weight and preponderance of the evidence. The claimant has attached a revised chart note and letter from a referral doctor, who states that he was in error when he indicated she had an EMG in March 2000 that showed carpal tunnel syndrome (CTS). The respondent (carrier) urges affirmance.

DECISION

Reversed and remanded.

The claimant urges that the hearing officer based his decision on the results of an EMG test that does not exist. In support of her position, the claimant presents new evidence on appeal from Dr. C explaining that in his records, which were admitted into evidence at the CCH, he erroneously referred to an EMG test conducted in 2000, which showed that the claimant had CTS the year prior to her injury and before she worked for the employer, when in fact an EMG was not conducted in 2000.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we only consider evidence admitted at the hearing. Generally, we will not consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through a lack of diligence that it was not offered at the hearing, and whether it is so material that it could produce a different result if considered. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ).

The report in question was generated as the result of an examination that the claimant had on April 29, 2002; the CCH was May 2, 2002. When the carrier objected to the offer of this document at the CCH for failure to exchange, the carrier's attorney stated that he had received it only the day before. The claimant's representative then stated that he had "faxed" the report to the carrier's attorney at around 4:00 the previous afternoon "five minutes" after he himself had received it by fax. The claimant's representative indicated that he was surprised that the doctor had been able to write a

report so quickly after the examination. The report is five pages, single-spaced. Under these circumstances, only a minimal amount of time would have been afforded the claimant to review the medical record and ascertain the error in time to have it corrected. The new evidence attached to the appeal is the doctor's sworn letter that he recited the existence of a test not in fact performed and he enclosed a corrected medical report. These exceptional circumstances persuade us that, in this case, there was no lack of diligence by the claimant leading to the presentation of the corrected record attached to the appeal.

In considering whether the evidence is material, we have considered that, while the hearing officer's decision was not based solely on his belief that an EMG prior to the date of injury showed CTS, the discussion in the decision shows that his belief in the existence of the preinjury EMG was an important factor in his decision. Due to the exceptional circumstances of this case, we remand so that the hearing officer can consider this new aspect of the evidence. This remand should not be construed, however, as a directive to change the decision but simply to reweigh the evidence in light of this new development. We leave to the discretion of the hearing officer whether consideration of this additional evidence will necessitate a new live session of the CCH.

Pending resolution of the remand, a final decision has not been made in this case. However, since reversal and remand necessitate the issuance of a new decision and order by the hearing officer, a party who wishes to appeal from such new decision must file a request for review not later than 15 days after the date on which such new decision is received from the Texas Workers' Compensation Commission's Division of Hearings, pursuant to Section 410.202 which was amended June 17, 2001, to exclude Saturdays and Sundays and holidays listed in Section 662.003 of the Texas Government Code in the computation of the 15-day appeal and response periods. *See* Texas Workers' Compensation Commission Appeal No. 92642, decided January 20, 1993.

The true corporate name of the insurance carrier is **SECURITY INSURANCE COMPANY OF HARTFORD** and the name and address of its registered agent for service of process is

CORPORATION SERVICES COMPANY
800 BRAZOS
AUSTIN, TEXAS 78701.

Susan M. Kelley
Appeals Judge

CONCUR:

Michael B. McShane
Appeals Judge

Philip F. O'Neill
Appeals Judge